

NO. 45133-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. SMITH,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

Before the Honorable Scott A. Collier, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Michael Smith's convictions were entered in violation of his Fourteenth Amendment right to due process.

2. In the appellant's trial on charges of second degree assault and third degree assault of a police officer, the trial court erred in denying the appellant's request for jury instructions on self-defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court's failure to instruct the jury on Mr. Smith's lawful use of force violate his Fourteenth Amendment right to due process, where, when accused of second and third degree assault, Mr. Smith presented some evidence establishing a lawful use of force in self-defense? Assignment of Error 1.

2. Did the trial court err in denying Mr. Smith's request for self-defense instructions, where Washington Pattern Jury Instruction 17.02.01 required evidence of risk of actual danger of serious injury to the defendant by the conduct of a police officer, and where the evidence presented at trial would have allowed the jurors to conclude that such danger was actually present to Mr. Smith when he was confronted by a member of law enforcement? Assignments of Error 1 and 2.

C. STATEMENT OF THE CASE

1. Procedural facts:

The State charged Michael Smith with second degree assault in the Clark County Superior Court, pursuant to RCW 9A.36.021. Clerk's Papers [CP] 3. The State alleged the victim was Brian Ellithorpe, a Clark County deputy sheriff and gave notice of an enhancement that Mr. Smith committed assault while "the offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." RCW 9.94A.535(3)(v). CP 4. The State alleged in an amended information filed June 17, 2013, that Mr. Smith also committed assault in the third degree, pursuant to RCW 9A.36.031(1)(g). CP 6.

Jury trial in the matter started June 17, 2013, the Honorable Scott A. Collier presiding.

The trial judge refused to instruct the jury on the lawful use of force, as set forth in WPIC 17.02.01. Report of Proceedings [RP] at 191.¹

The jury returned guilty verdicts to the charges of second degree

¹ The record of proceedings consists of three volumes:
RP –April 22, April 26, May 15, and June 13, 2013, hearings;

assault and third degree assault. CP 96, 97. The jury found that the offense was committed against a law enforcement officer who was performing his or her official duties. CP 100.

Count I and Count II merged and Mr. Smith faced a standard range sentence of three to nine months. 2RP at 271. The court imposed an exceptional sentence of 366 days based on the jury's finding of the aggravating factor pursuant to RCW 9.94A.535. 2RP at 288; CP 113.

Timely notice of appeal was filed on July 17, 2013. CP 113. This appeal follows.

2. Testimony at trial:

While on duty in Vancouver, Clark County, Washington on April 21, 2013, Deputy Brian Ellithorpe saw Michael Smith "jog" across Highway 99 after waiting at a traffic signal. 1RP at 60, 61. Deputy Ellithorpe stated at trial that Mr. Smith crossed against the traffic signal, while the light was green. 1RP at 60. After crossing the road, Mr. Smith walked toward a store called Lyle's Village Pantry. 1RP at 61. The officer pulled into the store's parking lot and directed Mr. Smith to come over to his vehicle by gesturing with his arm. 1RP at 61. Mr. Smith looked at the deputy and then turned and went into the store. 1RP at 61-62. The deputy went into the

1RP-June 17, 2013, jury trial;

2RP-June 18, 2013, jury trial, and July 17, 2013, sentencing.

store to ask Mr. Smith to come outside to discuss the act of crossing the street against the light. 1RP at 62. He stated that Mr. Smith said "I don't think so" and raised his fists. 1RP at 64,65. Deputy Ellithorpe grabbed Mr. Smith's jacket and forced him back, causing Mr. Smith to fall. The deputy then grabbed his arm to roll him over in order to put on handcuffs. 1RP at 65. He stated that Mr. Smith punched him in the mouth, splitting his lip. 1RP at 66. The deputy used a Taser on Mr. Smith and then took him into custody. 1RP at 66-67. Other officers subsequently arrived. Deputy Ellithorpe drove himself to the hospital and was given three stitches. 1RP at 67, 69, 89.

Mr. Smith testified that he was crossing Highway 99 at a crosswalk, and that he crossed with the light and that he was not crossing illegally or "jaywalking." 1RP at 136. He stated that while in the store parking lot he saw the police vehicle but did not see Deputy Ellithorpe gesture for him to come to the vehicle. 1RP at 138. He continued into the store. 1RP at 138. He said that Deputy Ellithorpe came into the store and directed him to leave the building with him, and that he responded "no." 1RP at 138. He stated that he did so because he did not want to be away from the store employee or the store security cameras. 1RP at 138.

The store owner testified that the three security cameras in the store

were not operational on April 21, 2013. 1RP at 98.

Mr. Smith stated that while in the store, Deputy Elliothorpe started moving aggressively toward him and that he put up his arms with open fists. 1RP at 140. He stated that he felt threatened by the deputy and that he was afraid that the deputy might hit him. 1RP at 140, 141, 152.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. SMITH'S REQUEST FOR SELF DEFENSE INSTRUCTIONS PURSUANT TO WPIC 17.02.01.

a. Standard of review

A trial court's rejection of a proposed instruction is reviewed *de novo* if the refusal is based on an issue of law. *City of Tacoma v Belasco*, 114 Wash.App. 211, 214, 56 P.3d 618 (2002). If the refusal is based on a factual dispute, the evidence is taken in a light most favorable to the defendant, and review is for an abuse of discretion. *Id*; *see also State v. Smith*, 154 Wa.Ap. 272, 278, 223 P.3d 1262 (2009) (citing *State v. Fernandez-Medina*, 141 Wash.2d 448, 461, 6 P.3d 1150 (2000); *State v. Westlund*, 13 Wn. App. 460, 465, 536 P.2d 20 (1975).

b. A defendant is entitled to instructions on self-defense if there is some evidence to support giving the instruction.

Defense counsel for Mr. Smith requested an instruction pursuant to WPIC 17.02.01. 2RP at 180-191. The instruction provides that a defendant's use of force is lawful where used against a police officer effecting an arrest if the defendant was in "actual and imminent danger of serious injury." Counsel argued the evidence presented at trial supported this theory of self-defense 2RP at 187-190.

A person who is being arrested has a right to use reasonable and proportional force to resist an attempt to inflict injury. *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997). The correct standard for evaluating an accused person's use of force defense is set forth in the proposed WPIC.

The instruction provides:

It is a defense to a charge of [Assault in the Second Degree] that force used was lawful as defined in this instruction.

A person may use force to resist an arrest only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02.01

Following argument, the trial court denied Mr. Smith's request for jury instructions regarding self-defense against police officers, stating that although it was a "close call," the evidence was inadequate to warrant the giving of WPIC 17.02.01. 2RP at191.

An accused person is entitled to instructions on the defense theory of the case if there is evidence to support that theory; failure to so instruct is reversible error. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). The evidence is evaluated in the light most favorable to the proponent of the instruction. *In re Crace*, 157 Wn.App. 81, 107, 236 P.3d 914 (2010) (citing *Fernandez-Medina*, supra. See also, *State v. Westlund*, 13 Wn. App. 460, 465, 536 P.2d 20 (1975). When a defendant makes a claim of self-defense, he or she must set forth sufficient facts to establish the possibility of self-defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. See *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Instructions on the lawful use of force are required whenever there is some evidence to support the defense. *Walden*, 131 Wash.2d at 473.

- c. **The evidence presented required that the jury be instructed on self-defense because there was evidence of actual danger or threat of serious injury.**

Here, the trial court erred, because the evidence at trial allowed a finding of actual danger of serious injury to Mr. Smith, and thus justified the self-defense instruction requested by his counsel.

At trial Mr. Smith testified that the deputy directed him to leave the store, but that he does not trust the police and wanted to remain in view of surveillance cameras in the store. 1RP at 147, 153. He stated that he was afraid the deputy was going to injure him by hitting him or that the deputy would drag him outside. 1RP at 149, 150, 151. Reversal of Mr. Blodgett's convictions is therefore required. More critically, Mr. Smith testified that the deputy "advance[ed] on [him] aggressively," grabbed him by his shirt and lifted him up. 1RP at 140 151. The evidence below was more than adequate to allow a jury to find that Mr. Smith faced an actual risk of serious injury. This evidence shows the error of the trial court's reasoning. A jury could have found that he faced actual danger of serious injury.

Mr. Smith was entitled to the benefit of the well-established rule that, in determining whether a defendant was entitled to instructions on self-defense, an appellate court must view the underlying facts in the light most favorable to the defendant. *Westlund*, 13 Wn. App. at 465. Reversal of Mr. Smith's convictions is therefore required.

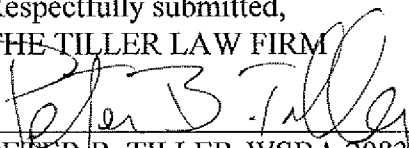
d. The error was not harmless.

The error in refusing to give self-defense instruction of WPIC 17.02.01 was not harmless. An error affecting a defendant's ability to raise a self-defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d, 484, 497, 656 P.2d 1064 (1983).

E. CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial.

DATED: January 9, 2014.

Respectfully submitted,
—THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 9, 2014, that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Susan Baur, Clark County Prosecutor, 312 SW 1st Ave., Kelso, WA 98626, and to

d. The error was not harmless.

The error in refusing to give self-defense instruction of WPIC 17.02.01 was not harmless. An error affecting a defendant's ability to raise a self-defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d, 484, 497, 656 P.2d 1064 (1983).

E. CONCLUSION

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DATED: January 9, 2014.

Respectfully submitted,

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The undersigned certifies that on January 9, 2014, that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Ann Cruser, Clark County Prosecutor, Clark County, and to

the appellant, Michael J. Smith, DOC #367625, Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, WA 98520, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 9, 2014.


PETER B. TILLER

TILLER LAW OFFICE

January 09, 2014 - 2:27 PM

Transmittal Letter

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